STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re:	)	**MPC 15-0203**	**MPC 110-0803**
	)	**MPC 208-1003**	**MPC 163-0803**
David S. Chase,	)	**MPC 148-0803**	**MPD 126-0803**
	)	**MPC 106-0803**	**MPC 209-1003**
Respondent.	)	**MPC 140-0803**	**MPC 89-0703**
	)	**MPC 122-0803**	**MPC 90-0703**
	)		**MPC 87-0703**

MOTION FOR ACCESS TO PATIENT MEDICAL RECORDS AND PATIENT EXAMS

Respondent, David S. Chase, M.D., through counsel, hereby moves the Medical Practice Board (the "Board") to exclude evidence regarding the medical condition and treatment of any complaining patient-witness who does not afford Dr. Chase the same access to medical records and eye examinations as he or she has afforded the State. In support of his Motion, Respondent relies upon the following incorporated Memorandum of Law and the attached Exhibits. Respondent requests an expedited hearing on this Motion.

MEMORANDUM OF LAW

I. Introduction.

An extremely significant and crucial component of the State's evidentiary case against Dr. Chase consists of the expert opinions by ophthalmologists who have recently examined the medical records and vision of 13 complaining witnesses previously diagnosed by Dr. Chase as having cataracts warranting surgery. According to the State, its medical witnesses will opine that, based upon an eye examination and the medical records of the pertinent complaining witnesses, cataract surgery for those witnesses is not medically appropriate at present and

therefore was not medically appropriate when Dr. Chase previously recommended such surgery for the patients. In order to defend against and test this expected State evidence, it is essential that Dr. Chase's own expert ophthalmologist be afforded the same opportunity to examine both the eyes and the complete medical records of each complaining witness. Otherwise, Dr. Chase will be rendered defenseless against the State's factual allegations, and the fairness and truth seeking function of the Board's proceedings will be severely compromised. The State's naked attempt to effect exactly that result in this case is both unfair to Dr. Chase and an irresponsible exercise of the State's prosecutorial authority

The means the State has employed to obtain its illegitimate goal are equally distasteful. After obtaining a release for medical records from the complaining witnesses and securing their acquiescence to share the results of eye examinations by the State's ophthalmologist witnesses, the State allied itself with private plaintiffs' lawyers seeking monetary damages from Dr. Chase to block Dr. Chase's access to the pertinent medical records and to shield the complaining witnesses eyes from examination by his experts.

At present, and as a result of the State's activities, most of the complaining witnesses have now refused to provide Dr. Chase with similar access to their medical records for the purpose of his own investigation in this matter. The refusal of at least some of these complaining witnesses to even sign Dr. Chase's medical records release form has been the direct and intended product of the State's conduct. That same conduct has also discouraged the State's patient-witnesses from undergoing an independent eye exam by Dr. Chase's own expert witness. The net result is that Dr. Chase has been deprived of access to the same crucial evidence that is the keystone of the State's own case against him and which is essential to an effective defense against the allegations set forth in the Superceding Specification of Charges.

The State's denial of Dr. Chase's access to the medical records and current eye examinations of the complaining witnesses is egregious when standing alone, but its debilitating effect on Dr. Chase's defense is exacerbated by the State's prior conduct in this case. Its current tactics are remarkably similar in nature to its prior wrongful conduct in urging third-party witnesses to refuse Dr. Chase's requests to interview them. Although the Board attempted to ameliorate the injurious consequences of the State's inappropriate interference with those witnesses, the Board's action was ultimately too little and came too late to remedy fully the harm caused Dr. Chase. Although Dr. Chase must now endure the harmful vestiges of the State's prior conduct, the conduct at issue now is fully susceptible to remedial action by the Board.

This Board cannot force the State's witnesses to submit to an eye examination or to produce their medical records to Dr. Chase. However, the Board can and most assuredly should give the State's witnesses a simple and fair choice: They must provide Dr. Chase the same equal access to their medical records and the same equal opportunity to be examined as they have provided to the State or be excluded from testifying at the merits hearing in this matter. No other remedy will guarantee that in presenting his defense, Dr. Chase will have access to the same information the State has at its disposal in prosecuting him. No other remedy will begin to guarantee a level playing field. And no other remedy will produce a meaningful hearing on the merits in this matter.

II. Factual Background.

A. The State Requires Its Complaining Witnesses To Sign A Medical Records Release Form In Favor Of The Board.

The Board utilizes a standard complaint form that it provides to anyone who wishes to file a complaint against a physician. That complaint form prominently informs each complainant: "***Please note: Investigation of your complaint also requires your signed release.***

When we receive both this signed Complaint Form and your Authorization for Release of Medical Records, we will send an acknowledgement assigning a docket number to your case."[1] This is consistent with Board Rule 13.2, which instructs that every complainant shall be notified "that a medical release form signed by the patient who is the subject of the complaint ***must be filed with the Board.***" Rule 13.2 (emphasis added). Thus, the Board's own Rules acknowledge that full investigation of any complaint requires a signed medical records release form, and the Board therefore will not even open a docket on a complaint without first receiving such a form. (Id.) By its terms, the Board's standard Release does not allow anyone else, including the Respondent, to access the complainant's medical records. [2]

The State required and received Releases from at least 12 of the 13 complainants it has named as witnesses in this matter.[3] Utilizing those releases, it has accessed at least some of the complaining witnesses' medical records from physicians other than Dr. Chase and has specifically relied upon those records in the Superceding Specification of Charges. The State has produced some, but not all, of those records to Dr. Chase.

B. The State Has Pursued A Course Of Conduct That Has Thwarted Dr. Chase's Efforts To Obtain Medical Records From And Diagnostic Information Regarding The Complaining Witnesses.

In the course of deposing the complaining witnesses, Dr. Chase has requested that they provide him with releases that are identical to those the State required the witnesses to sign.[4] Of

---

[1] See Medical Practice Board Complaint Form at 2, an example of which is attached hereto as Ex. A (emphasis added).

[2] See Medical Practice Board Authorization for the Release of Medical Records, an example of which is attached hereto as Ex. B.

[3] The State has not produced a Release signed by Judith Salatino, who did not submit a written Complaint to the Board. However, the State has obtained and produced certain of Ms. Salatino's medical records, indicating that she must have signed a Release in favor of the Board or otherwise consented to the disclosure of her medical records to the Board.

[4] See Respondent's proposed Release, an example of which is attached hereto as Ex. C. As to patient-witness Jan Kerr, Dr. Chase's attorneys requested and received a signed waiver in the format normally utilized by Respondent's counsel in similar cases. That waiver format is actually narrower than the Release utilized by the

the State's 13 patient-witnesses, only 6 have signed Dr. Chase's proposed release. The remainder have refused, even though they provided the State with exactly the same access to their medical records that Dr. Chase is seeking. Without the patient medical records it is very difficult, if not impossible, to effectively evaluate the State's claims regarding the complaining witnesses current medical conditions.

This fact is cogently demonstrated by Dr. Chase's inability to depose all of the doctors who provided the complaining witnesses with second opinions regarding their cataract treatment. Understandably, those doctors have refused to provide Dr. Chase with the patients' medical records, or to testify regarding their treatment of the patients, absent written releases from the patients to Dr. Chase. Without releases from the patient-witnesses, Dr. Chase will effectively be denied access both to the patients' relevant medical records and to the diagnostic opinions of some of the State's physician-witnesses, which are the heart of the State's case.

Rather than facilitating the preparation of this case for hearing by encouraging its witnesses to sign releases in favor of Dr. Chase, the State has actually worked behind the scenes to frustrate Dr. Chase's access to complaining witness medical records. As soon as Dr. Chase began to request waivers from witnesses, the State was in contact with malpractice attorneys who are suing Dr. Chase for money damages. The State inaccurately informed them that Dr. Chase was seeking records waivers unlimited in scope and duration.[5] Predictably, those lawyers, who have a compelling pecuniary interest in seeing Dr. Chase convicted of the Board charges, immediately sought to prevent Dr. Chase from receiving the same access to medical records that

---

Board. When the State and others raised objection to this request, Dr. Chase's attorneys modified their Release to be substantively identical to that utilized by the Board and the State, thereby eliminating any claim that it is impermissibly broad. Dr. Chase has used this second, Board-approved format in his requests of all subsequent witnesses.

[5] See June 8, 2004 letter from M. Hanley to E. Miller, attached hereto as Ex. D. The State also wrongly stated that Dr. Chase's attorneys had advised the patient-witnesses that they had waived their rights to confidentiality in those records by virtue of having filed complaints with the Board. Id.

had already been afforded to the State. First, they advised the complaining witnesses whom they represent (who had not yet been deposed) that they should not execute a release in favor of Dr. Chase. Second, they filed a motion in Chittenden Superior Court to prevent Dr. Chase from even contacting, much less seeking medical records from, ***every patient on whom Dr. Chase has performed surgery since 1997***. Dr. Chase has opposed this motion, pointing out that it is directly at odds with prevailing law and incompatible with his ability to defend himself in this proceeding. The Superior Court has not yet issued a decision.

In the meantime, the malpractice lawyers have continued to work to prevent Dr. Chase from gaining prompt access to relevant medical records. In a good faith attempt to reach compromise and advance this case to hearing, Dr. Chase proposed that the malpractice attorneys draft a more narrow release for their clients that would at least permit the timely depositions of the State's doctor witnesses.[6] Their response manifested complete and callous disregard Dr. Chase's discovery rights and the Board's processes and highlights the obstacles placed in Dr. Chase's path by the State.[7] The malpractice lawyers' subsequent counter-proposal is so narrowly drawn and riddled with conditions that it will completely vitiate its ostensible purpose of affording Dr. Chase an opportunity for an independent examination of the witness' true medical condition.[8]

The States conduct in this regard is on-going. After being explicitly informed by the malpractice lawyers that they would advise their clients against executing Dr. Chase's proposed releases, the State referred at least one of its patient-witnesses to those same plaintiffs' counsel

---

[6] See 6/30/04 email from E. Miller to M. Hanley, attached hereto as Ex. E.

[7] See 6/30/04 email from M. Hanley to E. Miller, attached hereto as Ex. F.

[8] See 7/14/04 letter from M. Hanley to E. Miller, attached hereto as Ex. G. In addition, the malpractice lawyer's proposal relates to only one of the three complaining witnesses who have retained him in this matter. Not even an limited release has yet been proposed for the other two.

for legal advice.[9] In addition, the State invited the same malpractice attorneys to attend the depositions of all of the complaining patient-witnesses who had received surgery from Dr. Chase, regardless of whether or not those attorneys had an attorney-client relationship with the witness. Predictably, at those depositions where malpractice attorneys have been present, they have obstructed Dr. Chase's examination of the witnesses, going so far as to instruct witnesses not to answer appropriate deposition questions seeking relevant, non-privileged information. When asked to explain the rationale of their instructions not to answer, plaintiffs' counsel simply refused, once again showing disdain for the Board's processes and the vital rights Dr. Chase has at stake in this case.[10] These obstructionist tactics are both the predictable and intended result of the State's decision to affirmatively solicit the malpractice lawyers' involvement in the Board matter without any legitimate purpose.

C. The Concerted Activity Of The State And The Malpractice Lawyers Will Prevent Dr. Chase From Obtaining Independent Medical Examinations Of The Complaining Witnesses.

The State has charged Dr. Chase with unprofessional conduct toward patients spanning the past decade, and Dr. Chase has only a limited recollection of the 13 patients the State has selectively chosen from the thousands he has treated. As a result, in determining why he made the diagnostic and treatment decisions he made, Dr. Chase is often left to rely on the paper record of his medical files alone. The State, in contrast, has had its complaining witnesses examined, either by their own doctors, by the State's expert, or both. Each complaining witness received such an examination and shared the results with the State. The State intends to present the results of those examinations against Dr. Chase at the hearing in this matter. Those

---

[9] In a telephone conference with the hearing officer in this matter, the State indicated that it had told patient-witness Margaret McGowan to contact the malpractice lawyers with questions regarding her deposition, even though Ms. McGowan was not and is not represented by such counsel. The telephone conference was not transcribed.

[10] See, e.g., June 22, 2004 Deposition of Judith Salatino ("Salatino Dep.") at 105-08, attached hereto as Ex. G.

examinations have taken place within the past year and were usually done for the specific purpose of second-guessing Dr. Chase's cataract diagnoses and treatment recommendations.

The results of those recent examinations by the State's physician witnesses will form the basis for opinions by those witnesses that cataract surgery is not currently a medically appropriate treatment for the complaining witnesses and, a fortiori, was not medically appropriate when recommended previously by Dr. Chase. Such opinions indisputably require judgments by the physicians based both on empirical observations of the patients and application of the physicians' knowledge and experience. The question of when cataract surgery is medically appropriate for a particular patient is frequently the subject of reasonable differences of opinion by equally competent ophthalmologists.

Thus, in order to defend the medical judgments being challenged by the State, Dr. Chase needs to present the results of a recent examination of the patients performed by his own expert. Toward that end, he is attempting to have all of the complaining-witnesses submit to such an exam in the coming weeks. However, given that most of the complaining witnesses have refused to even sign a medical records release in favor of Dr. Chase as the result of the concerted efforts of the State and the malpractice lawyers, it is virtually certain they will resist efforts by Respondent to have them examined as well.

D. The State Is Actively Cooperating With Plaintiffs' Counsel, Sharing Information With Them, And Further Creating An Appearance Of Bias On Behalf Of The State.

In return for the malpractice lawyers' help in blocking Dr. Chase's access to evidence in this case, the State has given substantial assistance to those lawyers in their efforts to sue Dr. Chase for untold sums of money in their civil lawsuit. In that case, counsel for complaining witness Judith Salatino is attempting to certify a class action in Chittenden Superior Court to

collect millions of dollars in damages and attorneys fees from Dr. Chase. In support of that effort, plaintiffs' counsel have filed numerous motions with the Court in which they have attached excerpts of deposition transcripts taken by Dr. Chase's counsel in this Board action. During many of those depositions, the witnesses discussed confidential medical information that should not have been disclosed outside these proceedings. The malpractice lawyers did not receive the deposition transcripts from Dr. Chase; they could only have received them from the State.

II. Discussion.

Under controlling legal principles, if Dr. Chase is to receive a fair hearing, he must have the same access to the complaining patient-witnesses and their medical records as has been afforded the State. If the State's witnesses are unwilling to give Dr. Chase the same access they have given the State, the State should not be allowed to rely upon their testimony, medical records, or medical condition at the hearing in this matter.

A. The Complaining Witnesses Have Waived Their Interest In The Confidentiality Of Their Medical Records By Virtue Of Agreeing To Testify As Complaining Witnesses In This Matter.

Both the Vermont Rules of Evidence and the Vermont Supreme Court make clear that a patient waives her interest in the confidentiality of her medical records when she puts her medical condition at issue. The Vermont Supreme Court has held that a patient's interest in the confidentiality of her medical records "is not sacrosanct and can properly be waived in the interest of public policy under appropriate circumstances." Peck v. Counseling Service of Addison County, 146 Vt. 61 (1985). Consistent with this holding, Vermont Rule of Evidence 503 states that there is no doctor-patient privilege in Vermont as to communications "relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which

he relies upon the condition as an element of his claim or defense." V.R.E. 503(d)(3). Similarly, the Supreme Court has held that a patient suing her doctor for malpractice waives any privilege or statutory right of confidentiality in medical records "causally or historically related to the patient-plaintiff's health put in issue by the injuries and damages claimed in the action." Mattison v. Poulen, 134 Vt. 158, 162-63 (1976). To hold otherwise would make the privilege "not a shield only, but a sword." Id. at 161 (internal quotation omitted).

These rules, and the public policies motivating them, do not apply solely when the patient is a plaintiff suing a doctor for malpractice. Rather, they apply whenever the patient has made an issue of her medical condition in a proceeding involving the adjudication of important rights. For instance, in In re: M.M., 153 Vt. 102 (1989), the State attempted to terminate the parental rights of a mother. The mother opposed the termination. The trial court excluded the State's evidence consisting of two psychological evaluations of the mother, holding that they were privileged. The Supreme Court reversed, finding that the mother had placed her mental health at issue and had thereby "justif[ied] the admission of testimony by treating physicians or the admission of psychiatric records." See id. at 105. In so doing, the Court explicitly held: "The fact that the mother did not initiate the termination proceedings or any other action . . . is not determinative." Id. Rather, the Court stated, "when otherwise inaccessible and privileged information becomes pertinent to an issue vital to the future well-being of the child, the parent's right to privacy and confidentiality must yield." Id. at n.4 (internal quotation omitted).[11]

Here, the complaining witnesses filed complaints against Dr. Chase. Based on those complaints, the State is attempting to terminate Dr. Chase's right to practice medicine—a constitutionally protected right. See Firman v. Department of State, 697 A.2d 291, 295 (Pa.

[11] Rule 503 has since been amended to more particularly spell out the instances in which the privilege does not apply in disputes over parental rights.

Commw. Ct. 1997) (citing Arnett v. Kennedy, 416 U.S. 134 (1974) and Barry v. Barchi, 443 U.S. 55, 65 (1979)). The complaining-witnesses have voluntarily agreed to testify against Dr. Chase in this license revocation proceeding, have voluntarily released all of their medical records to the State, have voluntarily agreed to share the results of recent eye exams conducted by the State's physician-witnesses, and have voluntarily agreed to allow those physicians to testify regarding their examinations. The State's case will turn on this very evidence.

In order to rebut these patient claims, Dr. Chase must be able to determine whether the patients reported similar symptoms to their other practitioners. He must also be allowed to know whether any of those other practitioners made diagnoses or treatment decisions that support his actions or refute the patients' claims and the State's allegations. According to well-settled law, the patients have therefore put their medical conditions at issue and have waived their interests in keeping confidential any medical records that might bear upon the propriety of Dr. Chase's decision to offer them cataract surgery.

Simply put, the State and its witnesses have placed at issue the medical conditions of the patient-witnesses and have done so in an attempt to terminate Dr. Chase's right to practice medicine. Because the patients' otherwise privileged or confidential information is directly "pertinent to an issue vital" to Dr. Chase's constitutionally recognized right in his medical license, the patients' "right to privacy and confidentiality must yield." Id. at n.4 (internal quotation omitted).

B. The Patient-Witnesses Have Waived Their Privilege By Providing Deposition Testimony Regarding Their Medical Condition And Treatments.

Nearly all of the complaining witnesses have now been deposed, and all who have been deposed have testified at length regarding their medical conditions and treatments by Dr. Chase and their other physicians, including the eye doctors who recently examined them. Thus, even if

the State's witnesses had not waived their patient privileges by virtue of volunteering as complaining witnesses in the Specification of Charges, they waived those privileges by virtue of giving deposition testimony regarding their medical conditions and the diagnoses and treatments of their other physicians. Vermont Rule of Evidence 510 clearly states: "A person upon whom these rules confer a privilege against disclosure waives the privilege if he . . . discloses or consents to the disclosure of any significant part of the privileged matter." V.R.E. 510. This rule "includes waiver by testimony of the holder of the privilege and by allowing testimony of another to the privileged matter without objection." V.R.E. 510, Reporters Notes. As one court recently put it, a "reference in his testimony [by a witness] to his communications with a physician should be deemed a waiver of the privilege as to that physician's knowledge." Hopkins v. State, 799 So.2d 874, 881 (Miss. 2001). "Otherwise, the privilege offers a license to perjury." Id. Stated differently, "[t]he physician-patient privilege . . . [is] to be used for preserving legitimate confidential communications, not for suppressing the truth after the privileged one lets the bars down." State v. Skillicorn, 944 S.W.2d 877, 897 (Mo. 1997) (internal quotation omitted).

Here, all of the patient-witnesses to be deposed have voluntarily testified regarding the diagnoses and treatments they received at the hands of all of their ophthalmologists, general practitioners, and specialists. As a result, under the plain language of Rule 510, every complaining witness that has been deposed has already waived her interest in the confidentiality of her medical records by testifying regarding her medical treatment. Any other conclusion would deny Dr. Chase the ability to effectively examine and rebut the patients' testimony, and would provide those patients "license to perjury." Hopkins, 799 So.2d at 881.

C. If The Complaining Witnesses Do Not Provide Dr. Chase Access To Relevant Medical Records, They Cannot Testify Against Him.

This Board cannot compel the complaining patient witnesses to actually hand over the medical records Dr. Chase is seeking. However, the Board has the authority to exclude from the hearing all evidence regarding any patient-witness who does not provide Dr. Chase the same access to her medical records as she has afforded the State. Cf. Greene v. Bell, 171 Vt. 280, 283 (2000) (court has inherent authority to enforce discovery requirements by excluding evidence). Moreover, the Board has a constitutional duty to make certain that the merits hearing in this matter affords Dr. Chase a meaningful opportunity to defend against the charges that have been leveled by the testifying witnesses. Firman, 697 A.2d at 295. As a result, absent the ability to force the patients to turn over their records, the Board has an obligation to exclude any evidence regarding the medical condition and treatment of those patient-witnesses who have refused to provide Dr. Chase medical records releases identical to the releases they have provided the State. See Skillicorn, 944 S.W.2d at 898 (court properly excluded testimony regarding patient treatment and condition where patient refused to provide opponent access to medical file after waiver of privilege); State v. Luna, 921 P.2d 950, 953 (N.M. 1996) (same). Exclusion of that testimony is the only way to protect Dr. Chase's right to a fair hearing. Luna, 921 P.2d at 954 ("Because the court could not order [v]ictim to release the records, exclusion of her testimony was the only proper disposition.").[12]

[12] This remedy is particularly appropriate in light of the State's demonstrated ability to provide Dr. Chase with the access he requests by encouraging its witnesses to sign his proposed release. The State's influence in this regard was demonstrated earlier in this proceeding when its request that the complaining witnesses not speak with Dr. Chase was met with nearly unanimous compliance.

D. The Board Should Order The Complaining Witnesses To Submit To Examination By Dr. Chase's Expert Or Exclude Them As Witnesses.

As noted above, Dr. Chase is also making arrangements for his own expert to perform eye exams of the patient witnesses, just as the State has done, so that he can effectively counter the State's evidence at hearing. Unless Dr. Chase has an opportunity to have his own expert examine the patient-witnesses and testify regarding his observations of their present condition, the imbalance between the evidence made available to the State and that made available to the Respondent will render the hearing fundamentally unfair.

As with compelling access to medical records, there is no statute or Board Rule granting the Board the authority to compel the patient-witnesses to submit to such an exam. However, the Board has the authority and obligation to ensure that Dr. Chase receives the fair and meaningful hearing to which he is constitutionally entitled, and must exclude evidence where necessary to serve that goal. Luna, 921 P.2d at 953. Here, that obligation requires the Board to exclude testimony regarding the complaining witnesses' medical conditions, either by the witnesses or their doctors or experts, unless those witnesses submit to an eye examination by Dr. Chase's own expert witness.

E. The Board Should Put An End To The State's Efforts To Deprive Dr. Chase of Evidence Through Concerted Activity With Private Malpractice Attorneys.

The State's active cooperation with the malpractice lawyers suing Dr. Chase is an improper use of the Board's resources and authority and should be stopped immediately. In this action, the Assistant Attorney General's ("AAG") duty is to act as the lawyer for the prosecutorial arm of the Board. See Board Rule 15.1. That arm of the Board is responsible for investigating, bringing charges, and presenting evidence of unprofessional conduct on the part of physicians before the adjudicatory arm of the Board. Id. It has no authority, and no legitimate role to play,

in any civil proceeding in which a plaintiff is suing a doctor for monetary damages. To the contrary, the Board's regulatory authority and legitimacy derive directly from its commitment to impartiality, both as a prosecutor and as an adjudicator of charges of unprofessional conduct. Stated simply, the Board's role is to see that justice is done, not that any particular doctor or patient wins or loses.

Nonetheless, the AAG representing the Board has enthusiastically embraced the malpractice lawyers suing Dr. Chase. Those lawyers, of course, do not share the AAG's obligation to act impartially; they have an ethical obligation to be zealous advocates for their patient-clients and against Dr. Chase. It is in their interests, both monetary and otherwise, to see that Dr. Chase be found guilty of the charges against him in this proceeding as it will advance their clients' interests in the civil money action. Despite this obvious fact, the AAG has both affirmatively solicited plaintiffs' counsel's involvement in this Board action and has actively provided information and assistance to plaintiffs' counsel in explicit and direct support of their efforts to hold Dr. Chase liable for millions of dollars. In return, the malpractice lawyers have assisted the State in this matter by thwarting Dr. Chase's discovery initiatives. In taking these actions, the AAG has further undermined the legitimacy of these proceedings, trampled Dr. Chase's rights, and potentially violated the rights of the patient-witnesses as well.

First, the AAG's active and explicit cooperation with plaintiffs' attorneys---which has included the sharing of information the Board has learned during the course of discovery, invitations to attend depositions, and the referral of a patient-witness as a client---is directly at odds with the Board's role as a fair prosecutor and judge. The State's action affirmatively signals to the public its belief that Dr. Chase should also be found liable for malpractice. Moreover, by aligning itself with the economically motivated malpractice attorneys and providing them with an

entrée into this proceeding, the State has underscored for its own complaining witnesses that they may obtain a significant economic award if they testify adversely to Dr. Chase and support the Specification of Charges. As long as its lawyer is actively helping people sue Dr. Chase, the Board cannot legitimately prosecute or adjudicate this action. Such action is not compatible with a commitment that justice be served; it is consistent only with a commitment to see Dr. Chase's career destroyed, whether by the Board or by civil claimants. The Board should strongly disavow the State's illegitimate use of the Board's authority and resources by ending this abuse.[13]

Second, the AAG's cooperation with plaintiffs' lawyers has directly compromised Dr. Chase's rights in this action. The State misinformed the plaintiffs' lawyers regarding the release Dr. Chase was seeking from patients, knowing full well that those lawyers would work to block Dr. Chase's efforts even if the State could not legitimately do so itself. The State also referred at least one of its patient-witnesses to those lawyers for representation, even after the lawyers had made clear that they would not allow their clients to sign Dr. Chase's proposed release. In short, the State has recruited the private plaintiffs' lawyers to engage in the truth-suppressing activities that it cannot itself undertake.

Finally, if, as it appears, the State provided plaintiffs counsel with deposition transcripts containing information regarding patient medical information, they may well have violated the rights of the patient-witnesses, not to mention state and federal law. Nearly every one of the deposition transcripts in the Board matter, whether or not the deposition was of a patient or a former staff member, contains confidential and privileged medical information of the patient-witnesses. Although those patient-witnesses may have waived their confidentiality rights for purposes of the Board action, they will likely be surprised to learn that the State is apparently

---

[13] The taxpayers of Vermont would be similarly troubled by the use of public resources are being used to advance the private gain of a small number of patients and lawyers.

sharing their otherwise confidential medical information with counsel representing plaintiffs suing Dr. Chase. For this reason as well, the Board must halt the State's inappropriate cooperation with plaintiffs' attorneys.

III. Conclusion.

For the reasons set forth above, Respondent respectfully requests that the Board exclude evidence regarding the medical condition and treatment of any patient-witness who does not afford Dr. Chase the same access to medical records and eye examinations as he or she has afforded the State.

Dated at Burlington, Vermont, this 20th day of July, 2004.

SHEEHEY FURLONG & BEHM P.C.
Attorneys for DAVID S. CHASE, M.D.

By: _____

Eric S. Miller
R. Jeffrey Behm
30 Main Street
P.O. Box 66
Burlington, VT 05402
(802) 864-9891

F:\WPDOCS\C\ChaseDavidMD\MedPrBd\Pleadings\Motion to Access Medical Records01.doc